In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-1361.

PAUL CELLA ET UX.,
PETITIONERS,

v.

PARTENREEDEREI MS RAVENNA ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Memorandum in Opposition to Petition for Writ of Certiorari.

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BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

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Memorandum Opposing Certiorari.

The respondent American Mutual Insurance Company, hereinafter called "American," opposes petitioners' petition for writ of certiorari from the decision of the First Circuit Court of Appeals in this matter made on December 29, 1975. By

implication petitioners maintain that, had American formally intervened in the personal action brought by the petitioners, no claim could be made by petitioners for an allocation of petitioners' counsel fees from the funds which are used to reimburse the compensation carrier's lien for compensation and medical payments made pursuant to the Longshoremen's and Harbour Workers' Compensation Act, 33 U.S.C. §§ 901 et seq., hereinafter called "Act." See Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit, at 7.

American contends that formal intervention is not necessary to avoid paying a fee to the longshoreman's attorney. *Russo* v. *Flota Mercante Grancolombiana*, 303 F. Supp. 1404 (S.D. N.Y. 1969). However, if formal intervention will protect the compensation carrier from being charged a fee by counsel for the longshoreman, then the question presented by this petition for a writ of certiorari is not so substantial nor of such practical significance as to warrant the Court's consideration since formal intervention could be undertaken by the carrier to avoid the fee.

Respondent agrees that there is a conflict among the circuit court decisions concerning the allocation of the longshoreman counsel's attorney's fee. It was created by the Fourth Circuit decision in *Swift* v. *Bolten*, 517 F. 2d 368 (4th Cir. 1975). Respondent contends, however, that the *Swift* decision, *supra*, not only conflicts with the decision of the First Circuit in this matter but also with the decisions of the other circuits. See, *e.g.*, *Fontana* v. *Grace Line, Inc.*, 205 F. 2d 151 (2d Cir. 1953), cert. denied, 346 U.S. 886 (1953); *Davis* v. *United States Lines Co.*, 253 F. 2d 262 (3d Cir. 1958); and *Ashcraft and Gerel* v. *Liberty Mutual Insurance Co.*, 343 F. 2d 333 (D.C. Cir. 1965). Petitioners contend that the 1972 amendment, P.L. 92-576, § 18, 1972, of § 5 of the Act, which eliminated third party actions against stevedores, requires the

allowance of attorney's fees against the compensation carrier. However, the *Fontana*, *Davis*, and *Ashcraft* cases, *supra*, did not involve third party defendants and all held against the allowance of attorney's fees.

The *Swift* decision, *supra*, relied on the following two cases which are not applicable to the awarding of attorney's fees to the longshoreman counsel. *Vaughn* v. *Atkinson*, 369 U.S. 527 (1962), reh. denied, 370 U.S. 965 (1962), concerned the defendant's bad faith denial of maintenance and care, and *Sheris* v. *Travelers Insurance Co.*, 491 F. 2d 603 (4th Cir. 1974), involved a state compensation statute which specifically allowed apportionment of attorney's fees between the plaintiff and compensation carrier. The *Swift* decision, *supra*, states that had the compensation carrier brought suit it would have had to pay for its attorney's fees. However, § 933 of the Act specifically allows the compensation carrier which brings suit in the name of the longshoreman to recover its lien as well as legal fees and expenses in connection with the suit. Thus, American believes that it is premature for review by the United States Supreme Court.

Conclusion.

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS D. BURNS,

Attorney for Respondent.